

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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KENDALL G. LUNDSTRUM,

Plaintiff-Counterdefendant-  
Appellee,

v

LYNNDA G. SCEARS-LUNDSTRUM,

Defendant-Counterplaintiff-  
Appellant.

UNPUBLISHED  
February 11, 2003

No. 231422  
Kalamazoo Circuit Court  
LC No. 99-000519-NZ

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Before: Sawyer, P.J., and Jansen and Donofrio, JJ.

PER CURIAM.

Defendant appeals as of right from a judgment on a jury verdict in favor of plaintiff on his malicious prosecution claim. We affirm.

The parties were married in 1992. Plaintiff pleaded no contest to a charge of spousal abuse in 1995. On approximately July 17, 1998, defendant reported to the police that plaintiff had assaulted and battered her two days earlier. A complaint was filed, a personal protection order was issued and a criminal action was commenced. Plaintiff filed for divorce on July 31, 1998. The criminal case was dismissed for lack of probable cause on October 28, 1998. On August 26, 1999, plaintiff filed the present suit against defendant for malicious prosecution and defendant counter-claimed with the charge of assault and battery.

Defendant subsequently moved for compulsory joinder of the divorce and the tort claims, and Kalamazoo Circuit Judge Philip D. Schaefer granted the motion. The case was then assigned to Judge Patricia Conlon in the family division of the circuit court.

Next, defendant moved for summary disposition. That motion was denied. The court proceeded to schedule a trial for the resolution of the property issues pursuant to the divorce and a separate jury trial with regard to plaintiff's malicious prosecution claim and defendant's counter-claim for assault and battery.

At trial for the tort claims, plaintiff denied having assaulted defendant, and therefore, asserted that defendant's complaint to the authorities consisted of false information and amounted to malicious prosecution. Defendant on the other hand, argued that plaintiff did

indeed assault her, and therefore, her complaint did not amount to malicious prosecution. The jury found for plaintiff on his malicious prosecution claim in the amount of \$30,000, and against defendant on her claim for assault and battery.

Defendant's first contention on appeal is that the trial court erred in denying her pretrial motion for summary disposition of the malicious prosecution claim.

Questions of law are reviewed de novo. *Ponke v Ponke*, 222 Mich App 276, 279; 564 NW2d 101 (1997). Similarly, a decision on a motion for summary disposition is reviewed de novo in order to determine whether the moving party is entitled to judgment as a matter of law. *Knauff v Oscoda Co Drain Comm'r*, 240 Mich App 485, 487; 618 NW2d 1 (2000).

Defendant moved for summary disposition on multiple grounds. First, defendant moved for summary disposition pursuant to MCR 2.116(C)(6) on the basis that "another action has been initiated between the parties involving the same claim," whereby she referenced the pending divorce action. She also, moved under MCR 2.116(C)(8) arguing that summary disposition was proper "for the reason that plaintiff has no independent cause of action for malicious prosecution against defendant outside of the divorce action pending." The trial court denied the motion brought under these subrules because the court determined the malicious prosecution claim to be a distinct cause of action from the divorce.

In her argument on appeal, defendant relies on *Gubin v Lodisev*, 197 Mich App 84; 494 NW2d 782 (1992), wherein the plaintiff-wife initiated a divorce action as well as an independent cause of action for fraud in the inducement to marry. *Gubin* holds that an independent action for fraud in the inducement to marry is so intimately related to a marriage contract that it cannot be separated or maintained apart from the divorce action. Specifically, in *Gubin*, this Court recognized that "[a]lthough it is well established in Michigan that one spouse may maintain an action against the other for certain torts committed during their marriage, *Hosko v Hosko*, 385 Mich 39; 187 NW2d 236 (1971), we note that these actions involve torts that are not so intimately bound up with the breakdown of the marriage itself," and went on to state that "[w]e nevertheless believe that allowing an independent action for fraud in the context of a divorce action where the allegations of fraud relate to the very existence of the marital relationship, would . . . 'turn every, or almost every dissolution case into two cases . . .'" *Id.* at 88.

Accordingly, *Gubin* is applicable specifically to situations of fraud in the inducement to marry. Two other cases, *McCoy v Cooke*, 165 Mich App 662; 419 NW2d 44 (1988), and *Goldman v Wexler*, 122 Mich App 744; 333 NW2d 121 (1983), allow for domestic tort actions distinct from a divorce proceeding. They both involve intentional tort actions for battery perpetrated in the marriage. In both cases, this Court held that the actions for the torts involved and the divorce actions were not a single cause of action, but separate and distinct, even though battery could be a factor in the divorce relative to the issue of fault in the division of property and in alimony. *McCoy*, *supra* at 662 and *Goldman*, *supra* at 744.

The tort of malicious prosecution is far less intimately intertwined with the breakdown of a marriage than fraud in the inducement of the marriage, the tort alleged in *Gubin*. Further, in the instant action, we find merit in the circuit court's determination that the postnuptial agreement, which contractually divided all property owned by the parties, and the fact that

neither party claimed alimony, placed plaintiff in the position where he could not recover by way of an action for divorce for a tort committed during marriage. Essentially, the circuit court reasoned that by being precluded from using property division or alimony, she would be unable to provide any remedy for the tort claim in a divorce action. Therefore, we conclude that the trial court did not err in denying defendant's summary disposition motion under subrules MCR 2.116(C)(6) and (C)(8).

Defendant also moved for summary disposition pursuant to MCR 2.116(C)(10). A grant of summary disposition pursuant to MCR 2.116(C)(10) requires the determination that "[e]xcept as to the amounts of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law."

The elements of an action for malicious prosecution are: (1) a criminal proceeding initiated or continued by defendant against plaintiff; (2) termination of the proceeding in favor of the accused; (3) the absence of probable cause for the proceeding; and (4) malice or a primary purpose other than that of bringing an offender to justice. *Matthews v Blue Cross & Blue Shield of Michigan*, 456 Mich 365, 378; 572 NW2d 603 (1998). Further, the state of Michigan requires the plaintiff to have suffered "special injury" in the nature of an interference with person or property. *Kauffman v Shefman*, 169 Mich App 829, 834; 426 NW2d 819 (1988). "[A] plaintiff in a malicious prosecution case may recover damages for mental anguish, embarrassment, and humiliation as elements of actual damages flowing from the injury. This type of damages often is the principal injury suffered by a plaintiff in such a case as this." *Pauley v Hall*, 124 Mich App 255, 269; 335 NW2d 197 (1983).

In this case, defendant claims that her providing information to the police does not satisfy this element, and is adamant in her assertion that she did not initiate a criminal proceeding. Generally, in order to satisfy the first element of malicious prosecution, the defendant must have taken some active part in instigating or encouraging the prosecution. *Wilson v Yono*, 65 Mich App 441, 443; 237 NW2d 494 (1975). However, our Supreme Court has established that knowingly submitting false information to a law enforcement authority to induce a prosecution is a basis for a claim of malicious prosecution. Specifically, the Court stated that "[i]f, however, the information is known by the giver to be false, an intelligent exercise of the officer's discretion becomes impossible and a prosecution based thereon is procured by the person giving the false information." *Renda v Int'l Union, UAAAIWA*, 366 Mich 58, 83; 114 NW2d 343 (1962). There was conflicting testimony on the record as to whether defendant knowingly submitted false statements to the police. Specifically, defendant stated that plaintiff assaulted her, which was supported by a police report. Plaintiff insisted that he did not assault defendant. That evidence presents an issue of material fact properly left for the jury to decide.

Defendant also argues that because "he was, however, unable to describe or quantify" his damages, plaintiff suffered no recoverable damages as a result of the alleged malicious prosecution and as a result, summary disposition was proper. However, the very nature of the injuries sustained, i.e., emotional distress, embarrassment and humiliation, inherently rendered damages difficult to quantify. There is evidence on record as to the existence of such injuries, which according to *Pauley, supra*, 269, qualify as requisite "special injuries," and the evidence presented genuine issues of material fact. It was properly left for the jury to decide the extent of

these alleged injuries and the amount of damages. Consequently, plaintiff's argument for summary disposition based on the fact that defendant has not quantified an amount of damages fails.

Defendant's next claim on appeal is that the trial court erred in allowing testimony as to the peacefulness of plaintiff's character. The decision whether to admit evidence is within the trial court's discretion; this Court only reverses such decisions where there is an abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). In this instance, the evidence as to plaintiff's peaceable, and defendant's non-peaceable, character was clearly aimed at proving that the parties acted in conformity therewith with respect to the alleged assault and battery, and is therefore inadmissible in accordance with MRE 404.

Nevertheless, courts are reluctant to overturn a jury's verdict when there is ample evidence to support it, and error requiring reversal may not be predicated on an evidentiary ruling unless a substantial right was affected. MRE 103(a), *People v Travis*, 443 Mich 668, 686; 505 NW2d 563 (1993). Accordingly, it has been firmly established that error in the admission of evidence is not a basis for vacating, modifying or otherwise disturbing a judgment unless the failure to correct the error would be inconsistent with substantial justice. *Miller v Hensley*, 244 Mich App 528, 531; 624 NW2d 582 (2001). Whether erroneously admitted evidence requires reversal depends on the nature of the error and its effect in light of the weight of the properly admitted evidence. *People v Smith*, 456 Mich 543, 555; 581 NW2d 654 (1998).

Although the evidence in this instance was improperly admitted, under the circumstances, its admission was harmless. The record is replete with evidence supporting the claim of malicious prosecution. The evidence defendant presented to the police of the alleged assault was bruises on her arm. However, two witnesses testified to seeing the bruising on defendant's arm one or two days before the alleged assault and battery. Moreover, the law enforcement officials agreed as to the lack of probable cause in the charges against plaintiff. Accordingly, in light of the weight of the properly admitted evidence, it cannot be said that the failure to correct the error was inconsistent with substantial justice. Therefore, the jury's verdict should not be disturbed.

Plaintiff's next claim on appeal is that the trial court erred in allowing testimony in relation to the alteration of an appointment book in 1995. This evidence was improperly admitted because it was irrelevant to the tort claims. However, for the same reason as described above, we believe its admission was harmless.

Next, defendant argues that the trial court erred in allowing testimony about how upset plaintiff was over the personal protection order proceeding.

MRE 402 states that "[a]ll relevant evidence is admissible . . . . Evidence which is not relevant is not admissible." "Relevance" is defined by MRE 401 as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

The personal protection order ("PPO") at issue originated pursuant to defendant's report that plaintiff assaulted her. Specifically, the PPO was issued on July 17, 1999, immediately upon

defendant's filing of the police report. Plaintiff testified that his appearance in court with respect to the PPO hearing was unpleasant and that the PPO caused him distress.

The trial court allowed the testimony on the basis that the PPO and the alleged malicious prosecution "are so intertwined that I will allow the plaintiff to testify about his emotional state during that time period related to the PPO." We also note that the trial court limited such testimony up to the issuance of the PPO and that "it does not appear to be relevant after that. . . So I will allow the questions and answers that have gone on up to this point and any additional questions regarding the emotional state during this time period."

We agree that the PPO proceedings are related to the alleged false claim. The PPO was entered pursuant to defendant's claim of assault. In the absence of this claim of assault, there would have been no PPO. Accordingly, testimony was relevant and the trial court did not err in admitting it.

Next, defendant alleges that the trial court erred in refusing defendant's request for a jury instruction relating to mitigation of damages. The refusal to give an applicable standard jury instruction will not result in error requiring reversal unless the failure to give the requested instruction so unfairly prejudiced one of the parties that the failure to vacate the jury's verdict would be inconsistent with substantial justice. *Johnson v Corbert* 423 Mich 304, 327; 377 NW2d 713 (1985); *Eide v Kelsey-Hayes Co*, 154 Mich App 142, 150-151; 397 NW2d 532 (1986), modified on other grounds *Eide v Kelsey-Hayes Co*, 431 Mich 26; 427 NW2d 488 (1988).

Here, defendant requested that the trial court instruct the jury as to the mitigation of damages according to SJ12d 53.05, which reads as follows:

A person has a duty to use ordinary care to minimize his or her damages after [he or she/his or her property] has been [injured/damaged]. It is for you to decide whether plaintiff failed to use such ordinary care and, if so, whether any damage resulted from such failure. You must not compensate the plaintiff for any portion of [his/her] damages which resulted from [his/her] failure to use such care.

Essentially, this instruction reflects a principle used to limit the amount of recoverable damages in both contract and tort actions; the doctrine of avoidable consequences. This doctrine states that a party cannot recover damages that he or she could have avoided by reasonable acts or expenditures. *Rich v Daily Creamery*, 296 Mich 270, 282; 296 NW 253 (1941).

Damages for malicious prosecution, however, have been determined to include plaintiff's expenses in protecting himself, loss of time, damage to business and credit, deprivation of liberty and the society of family, the injury to reputation or fame, and personal mortification. *Tutton v Olsen & Ebann*, 251 Mich 642, 650; 232 NW 399 (1930). Defendant has not alleged plaintiff's failure to mitigate with regard to any such damages.

Defendant is essentially arguing that plaintiff could have prevented her from filing the charges at issue by accepting an ultimatum she stated and depositing the \$10,000 into her

account. Defendant's argument is not really directed at the mitigation of damages; it is directed at whether plaintiff would have even had a claim for malicious prosecution. Defendant's argument is essentially that if plaintiff had succumbed to her extortionary attempt, she would never have made what the jury determined to be a false claim of battery, and he would never have been arrested. Specifically, defendant stated that "[i]f the testimony of Appellee is believed, he could have avoided any prosecution whatsoever by simply re-depositing the funds that he had taken from the parties' joint account," and by not doing so, "he invited the arrest, causing damages that he could have completely avoided without any effort or expenditure at all."

Regardless, plaintiff's ultimatum occurred before the submission of the report to the police, or before the existence of a claim for malicious prosecution. The malicious prosecution occurred upon defendant's submission of a false police report. Accordingly, before the submission of the report, there were no damages at that time to mitigate. Therefore, defendant's argument is without merit.

Finally, defendant maintains that the trial court erred in failing to follow a pretrial order for compulsory joinder issued by the judge who had this case before it was reassigned. This presents a question of law, which is reviewed de novo. *Ponke, supra*, 222 Mich App at 279.

MCR 2.613(B) provides that an order may be set aside or vacated only by the judge who entered the order, unless that judge is absent, or unable to act. Further, this Court has determined that the judge assigned to try a case is without authority to set aside or vacate an order entered by the pretrial judge. *Moy v Detroit Receiving Hosp*, 169 Mich App 600, 607; 426 NW2d 722 (1988).

Here, the trial court ruled that the tort case would proceed to a separate jury trial before the trial in the divorce case. Defendant argues that this amounted to the unauthorized setting aside of the pretrial order for compulsory joinder, pursuant to MCR 2.203, entered by Judge Schaefer. Defendant contends that this was in error.

Compulsory joinder pursuant to MCR 2.203 mandates that

[i]n a pleading that states a claim against an opposing party, the pleader must join every claim that the pleader has against that opposing party at the time of serving the pleading, if it arises out of the transaction or occurrence that is the subject matter of the action and does not require for its adjudication the presence of third parties over whom the court cannot acquire jurisdiction.

Here, the claims were joined as ordered by the previous judge, and proceeded on to the subsequently assigned judge who ordered separate trials on the claims in accordance with MCR 2.505(B), which states:

For convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, the court may order a separate trial of one or more claims, cross-claims, counter-claims, third-party claims, or issues.

We conclude that the trial court's actions were within its authority. The subsequent judge did not set aside the first judge's order for compulsory joinder, but simply separated the trials on the tort claims and the divorce claim pursuant to MCR 2.505, which was within her authority. Further, the Court having determined the malicious prosecution claim to be a distinct cause of action from the divorce, a separate trial preserved plaintiff's right to a trial by jury. Consequently, her actions were not in error, and defendant's argument is without merit.

Affirmed.

/s/ David H. Sawyer

/s/ Kathleen Jansen

/s/ Pat M. Donofrio